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28pgs

No. 06-427

Supreme Court U.S.
FILED
MAR 27 2007
OFFICE OF THE CLERK

In The
Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,

Petitioner,

v.

BRENTWOOD ACADEMY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS AND TENNESSEE ASSOCIATION OF INDEPENDENT SCHOOLS AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

The National Association of Independent Schools and Tennessee Association of Independent Schools will address the following question:

Whether the Sixth Circuit correctly held that the Tennessee Secondary School Athletic Association's enforcement of the Recruiting Rule violated the First Amendment rights of Brentwood Academy.

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IDENTIFICATION AND INTEREST OF *AMICI CURIAE*[1]

Amicus curiae National Association of Independent Schools ("NAIS") is a voluntary membership organization that represents more than 1,300 non-profit, tax-exempt independent elementary and secondary schools throughout the United States and abroad. NAIS member schools are governed by independent boards of trustees, funded through a combination of tuition, endowment and charitable contributions, and their educational quality and integrity are assured through accreditation by recognized state or regional accrediting organizations. NAIS also represents 63 state, regional, or national associations. Most NAIS member schools in the United States participate in athletic associations such as Petitioner, the Tennessee Secondary School Athletic Association ("TSSAA").

The active participation of NAIS schools in interscholastic athletic programs is a key component of the commitment of NAIS member schools to create a complete educational experience for their students. In carrying out this commitment, NAIS' Principles of Good Practice for Athletics are intended to ensure that the proper balance is struck between academic work and athletic activities, and particularly to ensure that athletic programs are carried out with integrity. In furtherance of this intent, NAIS encourages its member schools to work "directly and

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[1] Letters evidencing the consent of the parties to the filing of this brief have been submitted. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part and that no person or entity, other than *amici*, their members or their counsel, has made any monetary contribution to the preparation or submission of this brief.

candidly with other schools to prevent abuses in the following areas: recruitment, eligibility, transfer of student athletes, financial aid, and admission." The purpose behind this principle is to ensure that athletics does not supersede the importance of finding the appropriate school for every student. Further, NAIS recommends that its member schools ensure "that physical education teachers and coaches have appropriate training and knowledge of the school's mission, philosophy, and objectives." This principle is designed to ensure that the school's primary and overarching mission as an educational institution is not lost in the recruitment of athletes and in the athletic training and competition of its students. All NAIS member schools are asked to commit to adherence to all NAIS Principles of Good Practice, in both spirit and practice.

Amicus curiae Tennessee Association of Independent Schools ("TAIS") is the active voice and connective resource for 57 independent schools and more than 3,500 educators in Tennessee. Organized in 1968, TAIS is a service organization and network of independent boarding and day schools in Tennessee. A voluntary membership organization and NAIS member association, TAIS offers a broad variety of services to its member schools. Currently, 34 of the 57 TAIS member schools participate in activities sponsored by TSSAA. For this reason, TAIS and its members are directly impacted by the results of this decision.

TSSAA and the United States are asking this Court to grant governmental entities the same level of control over independent schools as well as any other non-governmental entities voluntarily participating in programs conducted by any state actor that they currently exercise over their own employees and contractors. However, granting that power would result in state actors, for

example, public schools, regulating non-governmental entities with which they also directly compete, for example, all independent schools, including all the NAIS and TAIS member schools, with only limited constitutional protection for the independent schools. NAIS has worked for decades to protect the nation's vital interest in a thriving independent school sector, with a key component of that interest being the ability of independent schools to compete for students fairly with all other schools, public and independent. The interpretation of the First Amendment asserted by TSSAA, if adopted, would severely impair that interest.

In this case, TSSAA openly acknowledges this by arguing that it is trying to "level the playing field" of competition. While this result is troubling where the area of competition is sports, granting state actors the level of control sought here by TSSAA would have a potentially disastrous impact on all programs in which independent schools currently participate and compete with public schools, including school choice initiatives.

One such impact, which goes far beyond the sports-related matter specifically at issue, would be the manner through which these governmental entities would exercise their newly expanded power to regulate independent schools. NAIS and TAIS are extremely concerned that this power would be used to undermine the ability of independent schools to continue to participate in a wide variety of federal and state programs specifically designed to include their equal participation with the public schools. This is particularly true at the state level where some state departments of education are already reluctant to allow independent schools to participate in programming.

Such an outcome would be extremely deleterious to the member schools of NAIS and TAIS because these regulators would have broad discretion, subject at best to only limited oversight, and, if TSSAA has its way, there would be no viable recourse for any independent school adversely affected by decisions of those regulators other than to withdraw from participation in whatever programs were involved. Withdrawal from programs in which independent schools currently participate and compete with public schools, including school choice initiatives, would be very detrimental to the educational mission of all schools, whether public or independent, and to their students.

SUMMARY OF ARGUMENT

The Sixth Circuit correctly applied First Amendment principles to the State of Tennessee, acting through TSSAA as a regulator, not as an employer, contractor, or disburser of funds. The Sixth Circuit also correctly understood that TSSAA's enforcement of the Recruiting Rule restricted the right of an independent school, Brentwood Academy ("Brentwood"), to disseminate information about its extracurricular activities to 12 middle school students who had decided to attend that independent school and indicated their interest to do so by, *inter alia*, signing enrollment contracts.

The voluntariness of Brentwood's participation in TSSAA does not result in a prospective forfeiture of Brentwood's right to challenge the Recruiting Rule on First Amendment grounds. The apt analogy is to cases such as *Board of Regents of the University of Wisconsin*

System v. Southworth, 529 U.S. 217 (2000), where the voluntariness of students agreeing to attend a state university and abide by its rules did not foreclose them from objecting on First Amendment grounds to the manner in which their mandatory student activity fees were being spent by that university.

The letters sent by Brentwood's football coach (the "Spring Practice Letters") notified all 12 of the incoming male middle school students that they could participate in spring football practice and invited them to do so. TSSAA's rules at that time permitted eighth graders to participate in *any* high school's spring football practice. As a result, TSSAA is forced to argue that it was the Spring Practice Letters "alone" that violated the Recruiting Rule. However, the Sixth Circuit understood that the Spring Practice Letters were simply information being provided to incoming students about an extracurricular activity available to them. This type of information is protected by the First Amendment. Moreover, one of the bedrock principles of the First Amendment is the right to receive such information. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969); *Stanley v. Georgia*, 394 U.S. 557 (1969). TSSAA simply ignores this right. Instead, TSSAA claims that this case is about game rules. However, the real competition is between public schools and independent schools for students, and what is paramount is the right of all schools to disseminate information about what they have to offer and the right of parents and prospective students to receive that information.

Because Brentwood was sanctioned for disseminating just that type of information, the Sixth Circuit properly held that the Recruiting Rule was not narrowly tailored. Indeed, the real underlying problem was eighth graders

participating in high school spring football practice, and TSSAA ultimately banned such participation. Accordingly, as applied, the Recruiting Rule did not advance the substantial State interests TSSAA claimed as its goals.

TSSAA also violated the First Amendment because, as applied, the Recruiting Rule favored certain speakers – public schools – and enhanced their power to disseminate information over others – independent schools – in violation of the First Amendment. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

This violation was the result of the "feeder pattern" exception to the Recruiting Rule. The "feeder pattern" consists of the public middle schools whose students will, generally in accordance with a geographic assignment methodology prescribed by the public high school district or other public authority, attend a given public high school upon graduation from the eighth grade, if they attend a public high school. Every public middle school is therefore made part of some public high school's feeder pattern, and every public high school, of course, has public middle schools in its "feeder pattern." However, as an independent school, Brentwood had none: there was no State-determined cohort of middle schools "feeding" their students into Brentwood. In fact, as an independent school, Brentwood could only have had students in its "feeder pattern" if there was a Brentwood Middle School or if Brentwood itself included the eighth grade.

If Brentwood were to have had schools in a prescribed feeder pattern recognized by TSSAA, and if the 12 middle school students who received the Spring Practice Letter had been in Brentwood's feeder pattern, an exception to

what TSSAA defines in the Recruiting Rule as "undue influence" would apply. Hence, there would have been no violation of the Recruiting Rule by Brentwood. However, as an independent school, Brentwood did not and would not have a recognized "feeder pattern."

In addition, if these same 12 middle school students had been in the feeder pattern for Public High School A and the coach of Public High School A had sent a letter inviting them to Public High School A's spring football practice similar to the Spring Practice Letter Brentwood's coach sent, there would have been no violation of the Recruiting Rule by Public High School A.

Therefore, because the Recruiting Rule sanctioned Brentwood for sending letters Public High School A would have been permitted to send under the "feeder pattern" exception, or Brentwood itself could have sent if TSSAA had allowed Brentwood to have a "feeder pattern," the Recruiting Rule was not narrowly tailored. The Recruiting Rule also regulated expression in a manner that did not advance TSSAA's stated goals and burdened more speech than necessary to further the State's substantial interests. The "feeder pattern" exception also demonstrates that the Recruiting Rule as applied was not a valid time, place, or manner restriction.

ARGUMENT

THE RECRUITING RULE, AS APPLIED, VIOLATED BRENTWOOD'S FIRST AMENDMENT RIGHTS.

In deciding Brentwood's First Amendment claim, the Sixth Circuit applied an intermediate level of scrutiny to

the Recruiting Rule, which is a content-neutral regulation by the State of the time, place, and manner of speech. Pet. App. 96a-97a. Intermediate scrutiny is the correct standard because the Recruiting Rule is properly considered State regulation. The Sixth Circuit correctly applied that standard in holding that, as applied to Brentwood, the Recruiting Rule "was not a narrowly tailored way to keep athletics subordinate to academics at Brentwood or ensure that the student athletes being contacted were not being exploited." Pet. App. 102a (footnote omitted).

A. The Recruiting Rule Is A Form Of State Regulation.

This Court has already ruled regarding TSSAA's role as regulator. "The action before us responds to a 1997 regulatory enforcement proceeding brought against" Brentwood. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 293 (2001). This Court also stated that TSSAA "has historically been seen to regulate in lieu of the State Board of Education's exercise of its own authority." 531 U.S. at 291.[2]

Therefore, the Court should reject TSSAA's claim that its regulation of member schools is not that of a State regulating its citizens, just as the Court rejected the similar contention in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). There, a commission created by state statute argued that "it d[id] not regulate or suppress obscenity but simply exhort[ed] booksellers and advise[d]

[2] One of the purposes of the TSSAA is to "regulate the athletic relations of the secondary schools in Tennessee." TSSAA Constitution, Art. I, Section 2, JA-134.

them of their legal rights." *Id.* at 66. The Court, refusing to elevate form over substance, concluded that the "Commission's operation is a form of effective state regulation superimposed upon the State's criminal regulation of obscenity and making such regulation largely unnecessary." *Id.* at 69.

Contrary to TSSAA's contention, Pet. Br. 31-32, the Sixth Circuit was not confused as to the nature of TSSAA's regulation of its member schools when it held that the "TSSAA, in administering its rules and regulations and imposing penalties against member schools, acts as a regulator, not as an employer, contractor, or disburser of funds." Pet. App. 95a.[3] TSSAA implicitly concedes that point when it strains to distinguish between TSSAA's exercise of "some form of sovereign 'regulatory' authority" over its public school members and its exercise of that same authority over its independent school members on the ground that "the Board of Education itself has no supervisory authority over the rules for private school competition." Pet. Br. at 31. However, this is a distinction without a difference because no Tennessee public school is required to join TSSAA.[4] Therefore, TSSAA's authority

[3] In addition to the fact that the State does not fund any of Brentwood's activities, TSSAA quotes the Sixth Circuit's previous finding that "'TSSAA receives no funding from the state.'" Pet. Br. 4 (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 180 F.3d 758, 762 (6th Cir. 1999)). Moreover, TSSAA's primary sources of its own funding are gate receipts from tournaments TSSAA sponsors for its member schools and membership dues, Pet. Br. at 4, which this Court described as "income received in their stead. . . ." 531 U.S. at 290-91.

[4] This Court noted that TSSAA includes "most public schools" in Tennessee. 531 U.S. at 290.

over all of its member schools does not depend on whether they are public or independent.

The Court should also reject the claim made by the United States as *amicus* that TSSAA's role as regulator was akin to the way in which the government regulates its employees or contractors. Br. of the United States at 10-12. Indeed, in holding that TSSAA's "regulatory activity may and should be treated as state action," 531 U.S. at 291, this Court stated that only the inclusion of Brentwood and other independent schools making up 16% of TSSAA's membership "prevents the entwinement of [TSSAA] and the public school system from being total and their identities totally indistinguishable." 531 U.S. at 300.

Accordingly, the Sixth Circuit applied the correct legal standard of intermediate scrutiny to the Recruiting Rule for First Amendment purposes.

B. Brentwood Did Not Waive Its Right To Challenge The Recruiting Rule On First Amendment Grounds.

The voluntariness of Brentwood's participation in TSSAA does not result in a prospective forfeiture of Brentwood's right to challenge the Recruiting Rule on First Amendment grounds. TSSAA cannot condition membership on a basis that requires Brentwood or any other member school to give up all of its First Amendment rights. Thus, in *Widmar v. Vincent*, 454 U.S. 263, 268 (1981), the Court noted that a public university's institutional mission to provide education "does not exempt its actions from constitutional scrutiny."

Indeed, the apt analogy is to cases such as *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000). There, the Court addressed the circumstance of a public university which conditioned the opportunity to receive a college education on the payment of a mandatory student activity fee to support extracurricular expression by certain students to which other students objected. The Court held that "[i]f the University conditions the opportunity to receive a college education . . . on an agreement to support objectionable, extracurricular expression by other students, the rights acknowledged in *Abood* [*v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)] and *Keller* [*v. State Bar of Cal.*, 496 U.S. 1 (1990)] become implicated." *Id.* at 231. The Court further held that the "University must provide some protection to its students' First Amendment interests." *Id.* at 233.

There is no principled difference between the voluntariness of Brentwood's decision to join TSSAA and agreeing to abide by its rules and the voluntariness of the objecting students' decision to attend the University of Wisconsin and agreeing to abide by its rules. Neither Brentwood nor those students were thereby foreclosed from objecting to the manner in which those rules violated their First Amendment rights.

The cases TSSAA relies upon in support of its waiver arguments, Pet. Br. at 25-27, miss the mark because they arise in the context of employment contracts between the government and an employee, as in *Snepp v. United States*, 444 U.S. 507 (1980), or in the criminal context where the waiver was neither open-ended nor prospective, such as *United States v. Mezzanatto*, 513 U.S. 196 (1995).

In addition to its efforts to present this case as analogous to an employment context, TSSAA attempts to support the Recruiting Rule as applied to Brentwood by claiming that the First Amendment issues in this case must be viewed through the prism of a case which is "about athletic competition." Pet. Br. at 24. Indeed, TSSAA goes so far as to claim that the Recruiting Rule is no different than a "rule that a coach too vigorously protesting a referee's call will be ejected." Pet. Br. at 1. This case is not about athletic competition or game rules, and TSSAA's assertions trivialize the important First Amendment issues in this case. In urging the Court to use this prism, TSSAA essentially ignores one bedrock principle of the First Amendment: the right to receive information. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."). The State, acting through TSSAA, cannot, consistent with the First Amendment, restrict the content of information to prospective students regarding some extracurricular activities (those involving interscholastic sports) but not others (those not involving interscholastic sports).

This Court should be wary of any attempt by the State to expand the scope of its regulatory authority over independent schools, particularly under the guise of a case it seeks to portray as simply about athletics and game rules. Public schools and independent schools directly compete with each other in a variety of ways. Their principal competition is for students, and the right of students and their parents to have unfiltered access to information

about school choice so they can make the most informed decision is of paramount importance. It is also worthy of protection under the First Amendment.

Understanding what is really at issue here, the Sixth Circuit correctly found as follows:

> The information about spring football practice was simply information being provided to incoming students about an extracurricular activity available to them – an activity in which incoming students were allowed to participate under TSSAA rules. Incoming students at Brentwood received a variety of information about a multitude of topics and activities, including academics at the school, and the letters and calls should be seen in this context.

Pet. App. 104a (footnotes omitted).

Consistent with its efforts to narrow the implications of this case, TSSAA also asserts that the communications at issue here were not matters of "public concern." That assertion is both incorrect and reflects a fundamental misapprehension of what is at stake here in terms of the First Amendment.[5] Information regarding school choice in general and the extracurricular activities available to prospective students at a given school in particular are matters of public concern. They certainly were a matter of concern to the parents of these 12 middle school students, who "were glad" to have received the Spring Practice Letters. Pet. App. 103a. TSSAA relegates to a footnote its

[5] TSSAA's assertion is also irrelevant because the public concern doctrine in, for example, *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), only applies in situations where the government is acting as an employer.

assertion that "[t]o the extent Brentwood asserts a more generalized recruiting interest in informing the public of its curricular and extra-curricular offers, such speech of course is not implicated by TSSAA's rule." Pet. Br. 30 n.11. However, such speech is precisely what was sanctioned here. The Recruiting Rule is by no means limited to coaches. By its express terms, it applies to "any person connected, or not connected, with the school. . . ." JA-181.

Moreover, the Spring Practice Letters were at least as much a matter of public concern as what was at issue in *McGreevy v. Stroup*, 413 F.3d 359, 365 (3d Cir. 2005) (school nurse's advocacy on behalf of two disabled students was a matter of public concern), and *Richards v. Sandusky Community Schools*, 102 F. Supp. 2d 753, 758 (E.D. Mich. 2000) (school bus driver's reports regarding one child spitting on school bus "constituted a matter of concern to the community, or at the very least, to the other children on the bus and their parents").

TSSAA's contention that Brentwood's communications cannot be considered a matter of public concern because they were motivated by self-interest is also not correct. The fundamental distinction recognized in *Connick v. Myers*, 461 U.S. 138 (1983), is between matters of public concern and matters of only personal interest. Thus, the proper focus is on what a speaker intends to communicate rather than the speaker's intent in making that communication. In *Connick,* a public employee disseminated a questionnaire "to gather ammunition for another round of controversy with her superiors" because of her "dissatisfaction with a transfer." *Id.* at 148. Although this personal grievance was the impetus for the questionnaire, this Court concluded that "[o]ne question in [the] questionnaire . . . does touch upon a matter of public concern." *Id.* at 149.

In *Rankin v. McPherson*, 483 U.S. 378, 380 (1987), a county employee was fired after telling a co-worker in what he thought was a private conversation occurring after hearing a news report of an attempt to assassinate the President, that "'[i]f they go for him again, I hope they get him.'" This Court held that "[c]onsidering the statement in context, as *Connick* requires, discloses that it plainly dealt with a matter of public concern." *Id.* at 386.

The Sixth Circuit understood the importance of the First Amendment rights at issue in this case and correctly concluded that Brentwood did not waive its right to challenge the Recruiting Rule as applied to it on First Amendment grounds by joining TSSAA and agreeing to abide by its rules.

C. The Recruiting Rule Was Not Narrowly Tailored.

The Recruiting Rule was not narrowly tailored. The real underlying problem was not information about the availability of spring football practice because when the Spring Practice Letters were sent, eighth graders were permitted under TSSAA's rules to attend *any* high school's spring football practice. The real underlying problem was eighth graders participating in high school spring football practice. TSSAA ultimately banned such participation. Pet. App. 104a. Thus, as applied to Brentwood, the Recruiting Rule did not advance the substantial State interests TSSAA claimed as its goals. In addition, TSSAA sanctioned an independent school for disseminating information about one of its extracurricular activities to 12 middle school students, all of whom "had applied, been tested and admitted, and signed enrollment contracts with

Brentwood," Pet. App. 83a (footnote omitted), before they received the Spring Practice Letters.

Regardless of the actual reasons TSSAA decided to apply the Recruiting Rule to Brentwood's Spring Practice Letters, the text of the Recruiting Rule and its interpretive commentary, JA-181-JA-185, demonstrate that the Recruiting Rule was not narrowly tailored. The Sixth Circuit correctly concluded that the Recruiting Rule does not withstand intermediate scrutiny for this reason. Pet. App. 106a-107a. The Sixth Circuit also was correct that the Recruiting Rule, as applied, violated Brentwood's First Amendment rights.

The full text of the Recruiting Rule is:

> Section 21. The use of undue influence on a student (with or without an athletic record), the parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule.

JA-181.

One of the things the commentary to the Recruiting Rule in effect defines as "undue influence" is:

> Any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school **except where there is a definite feeder pattern.**

JA-182 (emphasis added).

The "feeder pattern" consists of the public middle schools whose students will, generally in accordance with a geographic assignment methodology prescribed by the

public high school district or other public authority, attend a given public high school upon graduation from the eighth grade, if they attend a public high school. Every public middle school is therefore made part of some public high school's feeder pattern, and every public high school, of course, has public middle schools in its "feeder pattern." However, as an independent school, Brentwood had none: there was no State-determined cohort of middle schools "feeding" their students into Brentwood. In fact, as an independent school, Brentwood could only have had students in its "feeder pattern" if there was a Brentwood Middle School or if Brentwood itself included the eighth grade. Thus, the "parties have stipulated that [Brentwood] has no schools in its feeder pattern." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 13 F. Supp. 2d 670, 687 (M.D. Tenn. 1998).

This is a critical fact for several reasons. First, if TSSAA had allowed Brentwood to have middle schools in its feeder pattern as every public high school did, and if the 12 middle school students who received the Spring Practice Letter had been in Brentwood's feeder pattern, an exception to what TSSAA defines as "undue influence" would apply. Hence, there would have been no violation of the Recruiting Rule by Brentwood.

Second, if these same 12 middle school students had been in the feeder pattern for Public High School A and the coach of Public High School A had sent a letter inviting them to Public High School A's spring football practice similar to the Spring Practice Letter Brentwood's coach sent, an exception to what TSSAA defines as "undue influence" would apply. Hence, there would have been no violation of the Recruiting Rule by Public High School A.

Third, notwithstanding the foregoing and substituting hyperbole for fact and common sense, TSSAA contends that "Brentwood's violations were unambiguous and clearly harmed the interests the recruiting rule is designed to serve." Pet. Br. at 33. However, as its support, TSSAA can only speculate that "[t]he practice invitation alone" resulted in 12 middle school students leaving their own school's extracurricular activities and "*perhaps* [gave] Brentwood an opportunity to evaluate their skills before making final decisions on financial aid packages." Pet. Br. at 33 (emphasis added).[6]

Fourth, it must be kept in mind that the substantial governmental interests TSSAA contends were served by the Recruiting Rule were subordinating athletics to academics, protecting students from exploitation, and competitive equity (the so-called "level playing field"). Pet. App. 97a. However, if Public High School A's invitation to spring football practice would not have violated the Recruiting Rule when sent to middle school students in its feeder pattern, TSSAA's claims, echoed by numerous *amici*, about the harms from the "practice invitation alone," and in particular "competitive equity" and "level playing field," are revealed as simply makeweight.

As a result of the "feeder pattern" exception to when there is a violation of the Recruiting Rule,[7] TSSAA is forced to argue that the Recruiting Rule is entitled to be

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[6] It is troubling that after the extensive discovery in this case and a full trial, TSSAA elects to make arguments in this Court lacking any basis in the record whatsoever.

[7] The trial court found as a fact "that the 'feeder pattern' exceptions have long existed and have been applied by the TSSAA and relied upon by member schools." Pet. App. 51a.

enforced against Brentwood even if Brentwood's violation – the "practice invitation alone" – had nothing to do with the State's interests for promulgating the Recruiting Rule. Pet. Br. at 37-38. However, TSSAA misreads the teaching of *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). There, the Court reaffirmed "that a regulation of the time, place or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so." *Id.* at 798. In so holding, the Court explained that "this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interest. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.* at 799 (footnote and citation omitted).

When tested against *Ward*, the Recruiting Rule gets a failing grade. The Recruiting Rule prohibits the "use of undue influence" on a student or his or her parent "to secure or to retain a student for athletic purposes. . . ." However, the Recruiting Rule cannot be sustained when, as applied to Brentwood, "the practice invitation alone," Pet. Br. at 33, constituted "undue influence" on the 12 middle school students who received them but similar letters sent to those same students would have been permissible if sent to those same 12 students by the public high school coaches in their respective feeder patterns. Moreover, the "feeder pattern" exception to the Recruiting Rule would have permitted those public high school coaches to have sent such letters to these 12 students even though the parents of all 12 had already returned signed

enrollment contracts to Brentwood stating the intention of those students to attend Brentwood. Pet. App. 83a.

Whatever goals TSSAA had in mind when it promulgated the Recruiting Rule insofar as spring football practice was concerned were achieved without impacting anyone's First Amendment rights by banning all middle school students from participating, which TSSAA subsequently did. Pet. App. 104a. Moreover, that subsequent prohibition underscores the conclusion that the Recruiting Rule was not narrowly tailored as applied to Brentwood. In *City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984), the Court contrasted the ban on billboards on public property, which it approved, with the ban on the distribution of leaflets under an anti-littering statute, which it had struck down in *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147, 162-63 (1939), because the anti-littering statute banned all leafletting rather than punishing litterers. The Court held that "[i]n contrast to *Schneider*, therefore, the application of the ordinance in this case responds precisely to the substantive problem which legitimately concerns the City. The ordinance curtails no more speech than is necessary to accomplish its purpose." 466 U.S. at 810.

In dissent, Judge Rogers concluded that "the anti-recruiting rule as applied to Brentwood is narrowly tailored and leaves Brentwood alternative channels to communicate its message" such as having "been distributed to representatives of private sports leagues near Brentwood, school administrators of other schools with a request for distribution, or students who on their own had contacted appropriate Brentwood officials." Pet. App. 145a (Rogers, J., dissenting). However, as this Court has noted, "[w]e are aware of no general principle that freedom of

speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is. Nor have we recognized any such limitation on the independent right of the listener to receive the information sought to be communicated." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1976).

Under these circumstances, the Recruiting Rule also violates the rule that "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) (citation omitted). In *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790-91 (1978), the Court stated that "[w]e noted only recently that 'the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . .'" (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)). When, as here, the Recruiting Rule has precisely that effect by favoring public schools when there is a "feeder pattern" over independent schools with no "feeder pattern," the First Amendment is violated.

Furthermore, that TSSAA's asserted interests may be substantial does not automatically sustain the Recruiting Rule. To the contrary, in *First Nat'l Bank*, the Court struck down on First Amendment grounds a state statute that prohibited corporations from spending money to influence the vote on referendum proposals. There, Massachusetts argued that corporate "participation would exert an undue influence on the outcome of a referendum vote. . . ." 435 U.S. at 789. The Court declined to consider that claim without support in the record or in legislative findings. *Id.*

Here, the trial court found that TSSAA has not done any studies on the harm of recruiting. Pet. App. 45a.

In *Edenfield v. Fane*, 507 U.S. 761, 770 (1993), the Court held that "[t]he penultimate prong of the *Central Hudson* test requires that the regulation impinging upon commercial expression 'directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose.'" (quoting *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557, 564 (1980)). The Court in *Edenfield* went on to hold that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it, which "burden is not satisfied by mere speculation or conjecture," but rather requires the governmental body to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 770-71 (citations omitted). The Sixth Circuit held that TSSAA failed to carry its burden. Pet. App. 106a-107a.

Moreover, although content-neutral, the Recruiting Rule "still must serve a substantial state interest in a direct and effective way. . . . Where a restriction on speech lacks this close and substantial relation to the governmental interests asserted, it cannot be, by definition, a reasonable time, place or manner restriction." *Edenfield*, 507 U.S. at 773 (internal quotations and citations omitted). As applied to Brentwood or any other independent school seeking to disseminate information about the extracurricular activities it has to offer – the activities which it is undisputed that these 12 students had a right to know about and participate in – the Recruiting Rule violates the First Amendment. A contrary holding would, at a minimum, give the public school sector greatly expanded

regulatory authority over the ability of independent schools to disseminate information to parents, prospective students and the public at large about what they have to offer as alternatives to public schools. Such a result would be disastrous for independent schools, students, parents and the First Amendment.

CONCLUSION

For the foregoing reasons, the National Association of Independent Schools and the Tennessee Association of Independent Schools urge this Court to affirm the judgment of the Sixth Circuit on the First Amendment issue.

Respectfully submitted,

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March 27, 2007